

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION**

IN RE: ETHICON, INC. PELVIC REPAIR
SYSTEMS PRODUCTS LIABILITY
LITIGATION

Master File No. 2:12-MD-02327
MDL 2327

ETHICON WAVE 3 CASES LISTED IN
EXHIBIT A

JOSEPH R. GOODWIN U.S. DISTRICT
JUDGE

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
LIMIT THE OPINIONS AND TESTIMONY OF JAIME L. SEPULVEDA-TORO, M.D.**

Pursuant to the Federal Rules of Evidence and Pretrial Order No. 210, Plaintiffs hereby adopt their Wave 1 briefing, Dkt. 2018, in Wave 3, with the exception of one modified argument set forth below. In Plaintiffs' Wave 1 briefing, they argued that Dr. Sepulveda's opinions on the pathological opinions of Plaintiffs' experts should be excluded. Dkt. 2018 at 12-13, ¶8. Plaintiffs withdraw that specific argument only and substitute the argument set forth below.

ARGUMENT

(8) Dr. Sepulveda-Toro's Opinions On The Pathological Opinions of Plaintiffs' Experts Should Be Excluded.

In the POP Report, Dr. Sepulveda-Toro opines: "The high degree of efficacy, the low rates of complications . . . are inconsistent with and refute Plaintiff's [sic] experts' claims and hypotheses, which in essence are speculation and conjecture based on irrelevant, unreliable and/or low level data." Ex. B to Dkt. 2014 (motion) at 20-21. In the SUI Report, Dr. Sepulveda-Toro notes that he has "reviewed the reports of experts for the Plaintiffs," Ex. C to Dkt. 2014 (motion) at 3; and therefore, the SUI Report is presumably meant to provide a similar pathological rebuttal as the POP Report. However, in his expert reports, Dr. Sepulveda-Toro fails to state with any specificity which of Plaintiffs' experts' opinions he believes are "speculation

and conjecture based on irrelevant, unreliable and/or low level data.” *See generally* Ex. B and C. This failure does not comply Federal Rule of Civil Procedure 26 and its disclosure requirements, and as a result, Dr. Sepulveda-Toro’s opinions in this regard should be excluded.

An expert is required to produce a written report that contains “a *complete statement of all opinions* the witness will express and the *basis and reasons* for them” as well as “the facts or data considered by the witness in forming them.” Fed. R. Civ. P. 26(a)(2)(B)(i) and (ii) (emphases added). Here, Dr. Sepulveda-Toro did not comply with the Federal Rule as he did not include an explanation for his opinions and did not even specify which of Plaintiffs’ experts’ opinions he consider to be based on “irrelevant, unreliable and/or low level data.” Defendants cannot argue that this failure to comply with the rules was substantially justified or harmless. Without exclusion, Plaintiffs are put in the untenable position of preparing to examine Dr. Sepulveda-Toro at trial with no knowledge of which of Plaintiffs’ experts’ opinions he intends to challenge and the basis for any such challenge. For these reasons, Dr. Sepulveda’s opinions on Plaintiffs’ experts’ pathological opinions should be excluded. *See, e.g., Meyers v. Nat’l R.R. Passenger Corp.*, 619 F.3d 729, 734 (7th Cir. 2010) (noting that the purpose of expert disclosures is to allow opposing side to prepare a response, and the consequence for noncompliance with Rule 26(a)(2)(B) is “exclusion of an expert’s testimony” unless the failure was substantially justified or harmless).

CONCLUSION

For the reasons expressed in Plaintiffs’ Wave 1 briefing, and those expressed herein, Plaintiffs respectfully request the Court exclude or limit Dr. Sepulveda-Toro’s opinions.

Dated: September 19, 2016

Respectfully submitted,

/s/ Aimee H. Wagstaff

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CERTIFICATE OF SERVICE

I hereby certify that on September 19, 2016, I electronically filed the foregoing document with the Clerk of the court using CM/ECF system which will send notification of such filing to the CM/ECF participants registered to receive service in this MDL.

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